

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CHARLES NELSON,

Plaintiff,

v.

NEVADA DEPT. OF CORRECTIONS, et
al.,

Defendants.

Case No. 3:24-cv-00180-ART-CLB

SCREENING ORDER

Plaintiff, who is incarcerated in the custody of the Nevada Department of Corrections (“NDOC”), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983, and has filed an application to proceed *in forma pauperis* and a motion for appointment of counsel. (ECF Nos. 1, 1-1, 1-3). The Court screens Plaintiff’s civil rights complaint under 28 U.S.C. § 1915A and addresses the application and motion.

I. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which an incarcerated person seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1), (2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged violation was committed by a person acting under

1 color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

2 In addition to the screening requirements under § 1915A, pursuant to the
3 Prison Litigation Reform Act (“PLRA”), a federal court must dismiss an
4 incarcerated person’s claim if “the allegation of poverty is untrue” or if the action
5 “is frivolous or malicious, fails to state a claim on which relief may be granted,
6 or seeks monetary relief against a defendant who is immune from such relief.”
7 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure to state a claim upon
8 which relief can be granted is provided for in Federal Rule of Civil Procedure
9 12(b)(6), and the court applies the same standard under § 1915 when reviewing
10 the adequacy of a complaint or an amended complaint. When a court dismisses
11 a complaint under § 1915(e), the plaintiff should be given leave to amend the
12 complaint with directions as to curing its deficiencies, unless it is clear from the
13 face of the complaint that the deficiencies could not be cured by amendment.
14 *See Cato v. United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

15 Review under Rule 12(b)(6) is essentially a ruling on a question of law. *See*
16 *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for
17 failure to state a claim is proper only if it is clear that the plaintiff cannot prove
18 any set of facts in support of the claim that would entitle him or her to relief. *See*
19 *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999). In making this
20 determination, the court takes as true all allegations of material fact stated in
21 the complaint, and the court construes them in the light most favorable to the
22 plaintiff. *See Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th Cir. 1996).
23 Allegations of a *pro se* complainant are held to less stringent standards than
24 formal pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980).
25 While the standard under Rule 12(b)(6) does not require detailed factual
26 allegations, a plaintiff must provide more than mere labels and conclusions. *Bell*
27 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the
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1 elements of a cause of action is insufficient. *Id.*

2 Additionally, a reviewing court should “begin by identifying pleadings
3 [allegations] that, because they are no more than mere conclusions, are not
4 entitled to the assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).
5 “While legal conclusions can provide the framework of a complaint, they must
6 be supported with factual allegations.” *Id.* “When there are well-pleaded factual
7 allegations, a court should assume their veracity and then determine whether
8 they plausibly give rise to an entitlement to relief.” *Id.* “Determining whether a
9 complaint states a plausible claim for relief . . . [is] a context-specific task that
10 requires the reviewing court to draw on its judicial experience and common
11 sense.” *Id.*

12 Finally, all or part of a complaint filed by an incarcerated person may
13 therefore be dismissed *sua sponte* if that person’s claims lack an arguable basis
14 either in law or in fact. This includes claims based on legal conclusions that are
15 untenable (e.g., claims against defendants who are immune from suit or claims
16 of infringement of a legal interest which clearly does not exist), as well as claims
17 based on fanciful factual allegations (e.g., fantastic or delusional scenarios). *See*
18 *Neitzke v. Williams*, 490 U.S. 319, 327–28 (1989); *see also McKeever v. Block*,
19 932 F.2d 795, 798 (9th Cir. 1991).

20 **II. SCREENING OF COMPLAINT**

21 In the complaint, Plaintiff sues multiple defendants for events that took
22 place while Plaintiff was incarcerated at Ely State Prison (“ESP”). (ECF No. 1-1
23 at 1). Plaintiff sues Defendants NDOC, Grievance Coordinator P. Hernandez,
24 Property Room Sergeant S. Moskoff, and Senior Correctional Officer Naegle. (*Id.*
25 at 1-2). Plaintiff brings two claims¹ and seeks monetary damages. (*Id.* at 4-5).

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27 ¹ Plaintiff labels his two claims “Claim 2” and “Claim 3.” (ECF No. 1-1 at 3-4).
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1 Plaintiff alleges the following. In December 2022, C/O Naegle took
2 Plaintiff's boombox because it did not have a cord. (*Id.* at 3). Plaintiff explained
3 that he was waiting for a cord from the ESP CERT Team. (*Id.*) C/O Naegle
4 ignored Plaintiff and took the boombox anyway. (*Id.*) C/O Naegle did not give
5 Plaintiff an unauthorized property form. (*Id.*)

6 After C/O Naegle took Plaintiff's boombox, Plaintiff wrote multiple kites to
7 Sgt. Moskoff. (*Id.* at 4). Sgt. Moskoff partially granted relief by giving Plaintiff a
8 cord. (*Id.*) On July 26, 2023, C/O Gardner brought Plaintiff a cord but not his
9 boombox. (*Id.* at 3). Sgt. Moskoff knows that Plaintiff has not been given back
10 his boombox. (*Id.* at 4). Prison officials lost Plaintiff's boombox. (*Id.* at 3).
11 Plaintiff states that it is cruel and unusual punishment to lock him up in a cell
12 without his boombox. (*Id.*)

13 Plaintiff brings two claims for Eighth Amendment cruel and unusual
14 punishment for property deprivation. (*Id.* at 3-4). The Court dismisses the
15 Eighth Amendment claims without prejudice because there are no allegations in
16 the complaint to support an Eighth Amendment violation. Instead, the Court
17 interprets Plaintiff's allegations as a claim for Fourteenth Amendment due
18 process property deprivation.

19 While an authorized, intentional deprivation of property is actionable
20 under the Due Process Clause, neither a negligent nor intentional unauthorized
21 deprivation of property by a prison official is actionable if a meaningful post-
22 deprivation remedy is available for the loss. *Hudson v. Palmer*, 468 U.S. 517, 533
23 (1984); *Quick v. Jones*, 754 F.2d 1521, 1524 (9th Cir. 1985). An authorized
24 deprivation is one carried out pursuant to established state procedures,
25 regulations, or statutes. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436
26 (1982); *Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985); *see also*
27 *Knudson v. City of Ellensburg*, 832 F.2d 1142, 1149 (9th Cir. 1987).

1 Plaintiff fails to state a colorable due process claim. Based on the
2 allegations, C/O Naegle was not authorized to take Plaintiff's boombox because
3 he did not fill out unauthorized property form. Moreover, Plaintiff seems to allege
4 that prison officials negligently lost his boombox. Thus, prison officials engaged
5 in both a negligent and an intentionally unauthorized deprivation of Plaintiff's
6 boombox at different times. The State of Nevada provides Plaintiff with a
7 meaningful post-deprivation remedy for this type of loss. See Nev. Rev. Stat. §
8 41.0322 (setting forth guidelines for actions by persons in custody of the NDOC
9 to recover compensation for loss or injury). As such, the Court dismisses this
10 claim with prejudice, as amendment would be futile.

11 **III. MOTION FOR APPOINTMENT OF COUNSEL**

12 Plaintiff has filed a motion for appointment of counsel on a form stating
13 that he is unlearned in the law, his issues are difficult, and he is unable to
14 comprehend the proceedings. (ECF No. 1-3).

15 A litigant does not have a constitutional right to appointed counsel in 42
16 U.S.C. § 1983 civil rights claims. *Storseth v. Spellman*, 654 F.2d 1349, 1353 (9th
17 Cir. 1981). Pursuant to 28 U.S.C. § 1915(e)(1), "[t]he court may request an
18 attorney to represent any person unable to afford counsel." However, the court
19 will appoint counsel for indigent civil litigants only in "exceptional
20 circumstances." *Palmer v. Valdez*, 560 F.3d 965, 970 (9th Cir. 2009) (§ 1983
21 action). "When determining whether 'exceptional circumstances' exist, a court
22 must consider 'the likelihood of success on the merits as well as the ability of
23 the petitioner to articulate his claims *pro se* in light of the complexity of the legal
24 issues involved." *Id.* "Neither of these considerations is dispositive and instead
25 must be viewed together." *Id.*

26 In the instant case, Plaintiff has neither demonstrated a likelihood of
27 success on the merits nor exceptional circumstances that warrant the
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1 appointment of counsel. The Court denies the motion for appointment of
2 counsel.

3 **IV. CONCLUSION**

4 It is ordered that the complaint (ECF No. 1-1) is dismissed in its entirety
5 with prejudice as amendment would be futile for failure to state a claim.

6 It is further ordered that the motion for appointment of counsel (ECF No.
7 1-3) is denied.

8 It is therefore ordered that Plaintiff's application to proceed *in forma*
9 *pauperis* (ECF No. 1) without having to prepay the full filing fee is **denied** as
10 moot. It is further ordered that this Court certifies that any *in forma pauperis*
11 appeal from this order would **not** be taken "in good faith" pursuant to 28 U.S.C.
12 § 1915(a)(3).

13 It is further ordered that the Clerk of the Court close the case and enter
14 judgment accordingly.

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16 DATED: October 3, 2024.

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20 ANNE R. TRAUM
21 UNITED STATES DISTRICT JUDGE
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